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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1492

JORGEN D. BERING and WINIFRED E. BERING
Petitioners

VS.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

JORGEN D. BERING and WINIFRED E. BERING,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Jorgen D. Bering and Winifred E. Bering, his wife, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 21, 1970.

The ruling of the Internal Revenue Service is set forth as Appendix B-1 hereof.

The Memorandum, Findings of Fact and Opinion of the Tax Court of the United States, entered

October 30, 1968, are cited as T.C. Memo. (1968) 253 27 TCM 1338 and is printed as Appendix B-2 hereof.

The Order and Memorandum of the Tax Court issued December 11, 1968, denying retrial, further trial and reconsideration is not published, but is printed herein as Appendix B-3 hereof.

The Order of the Tax Court denying taxpayers' Second Motion for Retrial is likewise not published but is Appendix B-4 herein.

The Opinion of the Ninth Court of Appeals affirming the Tax Court is not yet published, 435 F.2d ....., but is Appendix B-5 herein.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 21, 1970 and rehearing was denied January 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the Court of Appeals was invoked under I.R.C. Sec. 7482.

QUESTIONS PRESENTED FOR REVIEW

The issues in this case are:

(a) Whether it is permissible for petitioner to be placed in the position of being denied tax relief under the income-averaging benefits of Section 1302 of the Internal Revenue Code of 1954, because instead of merely licensing his invention to an independent manufacturer, he manufactured the patented products

himself, thereby deriving income both from a manufacturing-selling function and an inventor function. The ruling below discriminates against inventor-manufacturers by raising obstacles to the apportionment in respect to the two types of income which are insuperable from a practical standpoint. Yet, considerations of public policy would tend to favor the inventor who does not merely derive income from a license agreement with a large manufacturer but establishes his own small independent business.

(b) Whether it is permissible to deny taxpayer's claim for relief under Section 1302 on a different basis each time it is considered, with no consistency or correlation between the grounds of denial. Thus, the Internal Revenue Service in ruling that there was a deficiency in petitioners' 1963 tax payment, the Tax Court in its Opinion on the original trial and on rehearing and the Court of Appeals each ruled against taxpayers on a different basis. It would seem a denial of due process of law for each decision against petitioner to be on a different basis and yet for no new trial to be granted. The original trial before the Tax Court was to establish whether a manufacturer-inventor as such was entitled to Section 1302. This point has now been conceded petitioner; but rather than send the case back for re-trial with this point established in taxpayer's favor for evidence to be directed to the issue of apportionment of the total income into invention income and manufacturing income, the Courts below have ruled against petitioner on successive inconsistent grounds. On hurdling one

obstacle, petitioner has found yet another raised in his path. This is such a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision (Rule 19, 1, (b)).

(c) Whether it is permissible for the Court of Appeals to deny to petitioner the benefit of the simple rules of arithmetic, namely, that although it is conceded that

total income = invention income + manufacturing-selling income

invention income cannot be computed by subtracting manufacturing-selling income from total income. The Court below ruled that the invention income must be estimated by testimony directed to a hypothetical situation of what the inventor would have charged himself as royalty if he had been dealing with himself in an arms-length arrangement. This reference to a hypothetical situation encourages speculation and irresponsible testimony. It is far more sound to first find what is a normal profit on a manufacturing-selling operation (a very common type of computation based upon a percentage of cost) and subtract from the known total income. Denial of taxpayer's approach is an arbitrary disregard of simple arithmetic.

Commencing with the filing of petitioner's 1963 income tax return, and consistently thereafter up to the filing of this Petition, petitioner has used the same method of calculation of invention income in proof of compliance with the 80 percent requirement of Section 1302, but he has been faced with a series

of inconsistent holdings against him. The ultimate issue before the Court is whether such a series of inconsistent holdings will be permitted or whether a new trial will be ordered.

STATUTE INVOLVED

The statutory provision involved is Section 1302 of the Internal Revenue Code of 1954 (which has since been repealed). This section is printed as Appendex A, *infra.*

STATEMENT OF FACTS

Other than the ultimate fact of whether the taxpayer received in the year 1963 in excess of 80% of his gross income from his invention, most of the evidentiary facts are not in dispute. The Findings of Fact of the Tax Court are largely favorable to taxpayer's position with the exception of the ultimate facts which are here in issue.

Appellants are husband and wife, residing in Sebastopol, California. Taxpayers filed joint income tax returns. Since the wife is a party to these proceedings only for the reason of having filed joint returns, the term "taxpayer" will be used hereafter to refer to Jorgen D. Bering, the husband. Taxpayer obtained patents for a stainless steel valve seat on September 1, 1959, Patent 2,902,250 which solved certain problems which had heretofore inhibited the use of stainless steel valves in milk processing equipment

and other installations where the sanitary qualities of stainless steel are important. Commencing in 1959, taxpayer attempted to license others to make his valves on a royalty basis but was unsuccessful. Thereupon taxpayer had parts for his valves made by machine shops and assembled the valves. This method of doing business was conducted during 1959, 1960 and 1961 on a small scale and at a loss.

American Can Company and Ex-Cell-O Corporation, the two largest makers of milk carton sealing equipment, then adopted taxpayer's valves as standard original equipment in their machines and sales increased very markedly. Although these companies had previously manufactured their own valves and were in a position to manufacture taxpayer's valves, they did not wish to do so on a royalty basis but wished to purchase the same from taxpayer. Taxpayer tried to arrange for expanding his purchases of parts from machine shops but difficulties arose which resulted in petitioner manufacturing his own valves. By March 1963, taxpayer was able to manufacture the valves in quantity and to obtain a profit on sales. Thus taxpayer's sales, income (and income tax) for 1963 was considerably greater than in previous years.

Thus during the year 1963, and also during the entire period 1959 through 1964, taxpayer received gross income which was made up of income allocable to his patented invention, and also to his manufacturing operations. The term "manufacturing" is used herein to cover both regular manufacturing and selling income. The Tax Court found that there was not

sufficient evidence of record to make a determination of the gross profit from the invention as distinguished from profit on manufacturing. However, by simple mathematical computation, under the facts of this case, so long as the manufacturing income is anywhere between 2% and 100% of cost, then 80% of the gross income from the invention was received in 1963. (This point was established below; it would appear unnecessary to belabor the point on this Petition).

Taxpayer suffered losses in 1959, 1960 and 1961 and hence the figures for those three years are excluded in the computation.

The schedule of business operations concerning the manufacturing and sales of patented valves was the subject of a portion of the original opinion of the Tax Court which is Appendix B-2 herein.

Certain of the requirements of Section 1302 were found to be met:

(1) Taxpayer included in gross income amounts in respect of a particular invention created by taxpayer.

(2) The work on the invention covered a period of 24 months or more.

The issue is as to Paragraph 3 of that Section.

The Commissioner's determination against petitioner was upheld by the Tax Court in its opinion and a decision of October 30, 1968. On December 2, 1968, taxpayer filed a motion entitled "Motion for Retrial, Further Trial and Reconsideration" which

was denied by the Tax Court in an order dated December 10, 1968.

The Court of Appeals on hearing and rehearing affirmed. Its jurisdiction had been invoked under I.R.C. 7482.

ARGUMENT

Petitioner as a manufacturer, manufacturing the product which he had invented, derived a total income which was the sum of his invention income and his manufacturing-selling income as is expressed by the equation:

Total income = business income + invention income.

Consistently, petitioner has arrived at the invention income by subtracting the business income from the total income. The business income was arrived at by estimate, and the invention income by subtraction. The business income is more readily estimated, being based on common experience of many businesses and is thus more accurate than any estimate of invention income could be.

The Internal Revenue Service at the outset ruled that because the taxpayer was a manufacturer, he could not get the benefit of Section 1302 and denied application of that section *in toto*.

The Tax Court, in its first Opinion, reversed the ruling of the Internal Revenue Service holding that Section 1302 was inapplicable to petitioner. The Tax

Court also ruled in taxpayer's favor by agreeing that it was permissible to compute the invention income by subtracting the business income from the total income. The Tax Court ruled against the petitioner, however, on the ground that he had not met the burden of proving the amount of the business income.

On re-hearing, the Tax Court admitted that there was sufficient proof of the business income for the year 1963 but raised a totally new issue: that this income varied in percentage for each of the years 1962, 1963 and 1964, and that there was no evidence of the different percentages which should apply in estimating that figure for each of the years in question.

The Court of Appeals, although granting that Section 1302 was available to petitioner, ruled that it was not permissible to arrive at invention income by subtraction and held the only way to find the invention income was by evidence of the hypothetical situation of what an inventor and a manufacturer dealing at arms-length would have agreed upon as a royalty in the years in question.

Thus, there were four rulings, each denying petitioner relief on a different basis, and these four reasons were mutually contradictory. The net result was one of confusion which denied to the taxpayer the benefits of Section 1302 which Congress intended him to have.

This treatment of an individual litigant by a governmental agency and the Courts with a capricious

jumping from one line of reasoning to another to defeat petitioner's claim is deadly. It renders the benefits and purposes of any statute which was designed to benefit an individual unworkable and meaningless. What has happened is that in each instance in which petitioner's claim has been passed upon, a different reason has been given for refusing the benefit of Section 1302 and the entire ground of argument has been changed. Since the Internal Revenue Service was held by the Tax Court to be wrong at the outset, the whole case should have been turned back with instruction to afford taxpayer the benefit of Section 1302 and to arrive at the invention income by subtraction of the business income from the total income. Similarly, the case should have been sent back for re-trial by the Court of Appeals. The issues have changed each time a decision has been rendered, with no opportunity for the taxpayer to deal directly with the Internal Revenue Service on the basis of each of the successive decisions. If each Court held that the preceding decision was erroneous, then the determination should have been sent back for a re-determination, using proper principles of decision.

REASONS FOR ALLOWANCE OF PETITION

One reason petitioner seeks allowance of this Petition is the series of inconsistent and artificial grounds for denial of relief under Section 1302. This section was intended to benefit creative individuals—inventors and authors. Surely inventors who become small businessmen, as has petitioner, are to be even more favored than those who merely license existing companies on a royalty basis. The Internal Revenue Service and the Courts below have failed in the Congressional purpose of favoring creative individuals and have raised barriers to petitioner in obtaining the benefit which Congress obviously intended him to have. If it were merely the same barrier, that would be unexceptional, but here after petitioner has scaled each barrier, a new one has been raised to block access to the benefit of Section 1302. This would appear to petitioner to be:

(a) A violation of due process of law;

(b) A departure from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

Hostility to the complex position of the creative individual in modern industry is a severe threat to the free enterprise system which must rely upon the creative individual to advance progress in the useful arts. Only the protection of the Court from administrative agencies, such as the Internal Revenue Service, can permit the creative individual to be in a position to develop and perform his crucial and difficult role. Petitioner seeks the protection of this Court against

the disorderly and chaotic inconsistent course of proceedings which has denied to him the benefit of what Congress intended him to have. The rights of an individual, this petitioner, must be respected lest all rights of all individuals are jeopardized. In that event, the rights of minorities, the rights of the citizen to protection against arbitrary government, are likewise jeopardized.

The Court is respectfully requested to grant this Petition.

Dated, San Francisco, California,
March 16, 1971.

Respectfully submitted,
JULIAN CAPLAN,
Counsel for Petitioners.

(Appendices Follow)

Appendix A

INTERNAL REVENUE CODE OF 1954
SECTION 1302

Title 26, USC § 1302. Income from an invention or artistic work

(a) Limitation on tax.—If—

(1) an individual includes in gross income amounts in respect of a particular invention or artistic work created by the individual; and

(2) The work on the invention or the artistic work covered a period of 24 months or more (from the beginning to the completion thereof); and

(3) The amounts in respect of the invention or the artistic work includible in gross income for the taxable year are not less than 80 percent of the gross income in respect of such invention or artistic work in the taxable year plus the gross income therefrom in previous taxable years and the 12 months immediately succeeding the close of the taxable year,

then the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over, in the case of an invention, that part of the period preceding the close of the taxable year or 60 months, whichever is shorter, or, in the case of an artistic work, that part of the

period preceding the close of the taxable year but not more than 36 months.

(b) Definitions.—For purposes of this section—

(1) Invention.—The term "invention" means a patent covering an invention of the individual.

(2) Artistic work.—The term "artistic work" means a literary, musical, or artistic composition or a copyright covering a literary, musical, or artistic composition.

Appendix B-1

RULING OF THE INTERNAL REVENUE SERVICE

It is determined that you are not entitled to compute the tax on the income from "Q-Controls", including the income which you designated as "Gross income from invention", under the provision of Section 1302 of the Internal Revenue Code of 1954 (as it applies to taxable years beginning before 1964).

Appendix B-2

T. C. Memo. 1968-253

Tax Court of the United States

Jorgen D. Bering and Winifred E. Bering, Petitioners v.
Commissioner of Internal Revenue, Respondent

Docket No. 3979-67. Filed October 30, 1968.

Jorgen D. Bering, pro se.

Robert M. Zimmerman, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

TIETJENS, *Judge:* The Commissioner determined deficiencies in income tax of petitioners in the amounts of $13,934.31 and $33.60, respectively, for the years 1963 and 1964. Petitioners concede their tax liability for 1964.

The sole issue in this case is whether the petitioner, Jorgen D. Bering, is entitled to apply the tax limitation provisions of section 1302, I.R.C. 1954,[1] in computing his income tax liability for the taxable year 1963.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation and the exhibits attached thereto are incorporated herein by this reference.

[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise stated.

Jorgen D. Bering and Winifred E. Bering, petitioners herein, are husband and wife. They resided in Sebastopol, California, at the time they filed their petition herein. Winifred E. Bering is a party to this action only because she filed joint income tax returns with her husband. Accordingly, Jorgen D. Bering will hereinafter be referred to as the petitioner.

The joint income tax returns of petitioners for the years 1959 to 1964, inclusive, were filed with the district director of internal revenue, San Francisco, California.

Petitioner Jorgen D. Bering is an industrial engineer and an inventor. He has obtained several patents in food processing machinery, including a patent on a valve seat design suited to extreme sanitary conditions. The principal feature of this design is a double line seal whereby a spherical plug comes into contact against both a cylinder and a cone section. The patent includes generic claims for stainless steel drain valves designed to overcome the surface quality of stainless steel which causes surfaces of it to stick together in juxtaposition. This sticking constitutes an operational hazard in valves, which operate by pushing metal surfaces together, and particularly in self-actuating valves (not actuated by outside forces) such as float valves, pressure and vacuum relief valves and check valves.

During 1959 and 1960, petitioner unsuccessfully attempted to interest others in manufacturing his valves on a royalty basis. To exploit his invention, then, he engaged various shops to manufacture valve parts.

Petitioner assembled the parts and sold the assembled valves. This method of doing business was conducted during 1959, 1960 and 1961 on a small scale and at a regular loss.

Toward the end of 1961 the American Can Company and the Ex-Cell-O Corporation, the two largest makers of milk filling equipment in the United States, adopted petitioner's float valves in their milk filling equipment. These companies had previously manufactured their own valves. They were in a position to manufacture the petitioner's valves, but expressed no interest in doing so on a royalty basis.

The adoption of his valves by these customers meant a suddenly expanded market. Arrangement for an adequate supply of valves proved difficult. As a result of this, and because of the inefficiency in having parts assembled by numerous shops, petitioner began to manufacture the valves himself.

It was not until March 1963 that the manufacturing, now largely operated by the petitioner, was brought to a reasonable state of competence, and that a substantial level of net manufacturing income was reached. Each valve manufactured and sold contained the identical patented valve seat design. About 90 percent of the total production was in float valves, and 84 percent of these valves were purchased by American Can and Ex-Cell-O, and related concerns.

Petitioner manufactured and sold four types of valves during the period 1959 through 1964. Each valve came in several sizes. The differences in the types and sizes of the valves, each containing the

identical patented valve seat design, allowed the patented feature to be employed in different manufacturing applications. A principal reason for the price variation between one valve size and another was the amount of material and labor needed to produce it.

During the period 1959 through 1964, petitioner sold 970 valves as follows:

Year	Number of Valves Sold
1959	40
1960	40
1961	100
1962	295
1963	412
1964	83
Total	970

The number of valves sold by petitioner during 1963 constitutes 42.47 percent of the total number of valves sold during the period 1959 through 1964.

The following schedule sets forth a breakdown of business income information, including amounts computed by petitioner in making out his returns, and as corrected to reflect the uncontested statutory notice adjustments by the Commissioner. The percentage of the 1963 gross receipts to the total gross receipts for all years is set forth. Similar comparisons have been made for gross profit figures, etc., as shown.

SCHEDULE OF BUSINESS OPERATIONS CONCERNING THE MANUFACTURE AND SALE OF PATENTED VALVES

	1959	1960	1961	1962	1963	1964	TOTALS	1963 Percentage to Total
Gross Receipts Per Return	$7,442.60	$7,182.50	$11,708.00	$64,277.79	$169,887.61	$38,739.00	$299,237.67	56.77
"Cost of Goods Sold" Per Return, Including Amounts Labeled "Income from Invention"	5,757.90	4,270.74	5,729.38	39,885.50	124,521.76	16,828.70	196,993.98	
Gross Profit Per Return	1,684.70	2,911.76	5,978.62	24,392.29	45,365.85	21,910.47	102,243.69	44.37
Add: Amount Labeled "Income from Invention" Which Petitioner Deducted as Cost of Goods Sold	0	0	0	5,272.67	51,603.21	0	56,875.88	Exceeds 80.00
Gross Profit from Business Operation Before Deduction for "Invention Gross Income"	1,684.70	2,911.76	5,978.62	29,664.96	96,969.06	21,910.47	159,119.57	60.94
Net Profit (or Loss) Per Return	(2,807.67)	(2,166.33)	(703.60)	6,761.70	10,000.00	3,303.55	20,065.25	
Add: "Income from Invention" Per Above	0	0	0	5,272.67	51,603.21	0	56,875.88	
Net Profit (or Loss) from Business Operation Before Deduction for "Invention Gross Income"	(2,807.67)	(2,166.33)	(703.60)	12,034.37	61,603.21	3,303.55	76,941.13	Exceeds 80.00
Add: Uncontested Statutory Notice Adjustments Relating to Business Operations	0	0	0	0	7,115.65	2,984.25	10,099.90	
Net Profit (or Loss) as Corrected	$(2,807.67)	$(2,166.33)	$(703.60)	$12,034.37	$68,718.86	$ 6,287.80	[1] $87,041.08	78.94

[1] Does not include losses.

OPINION

Petitioner received $96,969.06 gross income in 1963 from the manufacture and sale of valves incorporating his patented valve seat design. He seeks the benefit of section 1302, as applicable to years ending prior to January 1, 1964,[2] so far as it may provide a limitation on tax of some portion of this amount. There is no suggestion that the amount thus received in 1963 did not relate to operations, i.e., manufacturing and selling, conducted during that year. The claim to relief under section 1302 is based exclusively upon the facts that the manufactured article had been patented, that the period of time during which the pe-

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[2]Sec. 1302. Income from an Invention or Artistic Work.

(a) Limitation on Tax.—If—

(1) an individual includes in gross income amounts in respect of a particular invention or artistic work created by the individual; and

(2) the work on the invention or the artistic work covered a period of 24 months or more (from the beginning to the completion thereof); and

(3) the amounts in respect of the invention or the artistic work includible in gross income for the taxable year are not less than 80 percent of the gross income in respect of such invention or artistic work in the taxable year plus the gross income therefrom in previous taxable years and the 12 months immediately succeeding the close of the taxable year,

then the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over, in the case of an invention, that part of the period preceding the close of the taxable year or 60 months, whichever is shorter, or, in the case of an artistic work, that part of the period preceding the close of the taxable year but not more than 36 months.

(b) Definitions.—For purposes of this section—

(1) Invention.—The term "invention" means a patent covering an invention of the individual.

titioner conceived and developed his invention was in excess of 24 months, and upon petitioner's claim that gross income in respect of his invention for the taxable year 1963 is not less than 80 percent of the gross income in respect of the invention in the taxable year plus the gross income therefrom in previous taxable years and the 12 months immediately succeeding the close of the taxable year 1963.

The problem in this case is that the parties cannot agree as to the computation of gross income in respect of the invention. The difficulty arises because petitioner's gross income from his invention (whatever it be, if anything) was not derived from royalties as in the usual case where an inventor sells or assigns a patent in an arm's-length transaction for a certain or computable amount and receives royalties from the sale of the patented items on a per unit or other contractual basis. Rather, petitioner chose to exploit his invention by manufacturing and selling valves on his own which contained his patented feature.

He contends that an inventor who engages in the manufacture and sales of a patented item should be entitled to the same benefit, with respect to income from his invention, that section 1302 accords an inventor who licenses another to manufacture the patented items. In other words, that portion of gross income from the manufacture and sales of the patented valves which represents income from the invention, if it otherwise qualifies, should be subject to section 1302's limitation on tax. The Commissioner does not contend otherwise; nor do we think the Con-

gress intended to discriminate against the inventor-manufacturer. As this Court stated in *Alfred W. Barber,* 19 T.C. 600, 603:

> Of course, if it could be shown that some portion of the 1945 income from the manufacture and sale of the * * * [patented items] was allocable to the patent, then there would be a basis for the application of * * * [section 1302], but only to that extent.

The problem here, as in *Barber,* is that the taxpayer must show what portion, if any, of the income from the manufacture and sale of the patented items was allocable to the patent. This amount must be computed for the taxable year in question, 1963, in order to arrive at the amount of income that is subject to the tax limitation of section 1302. This amount must also be computed for the previous taxable years and for the 12 months immediately succeeding the close of the taxable year 1963 in order to determine whether the amount in respect of the invention includable in gross income for the taxable year 1963 is not less than 80 percent of the total of such amounts for the years 1959 through 1964. If it is less than 80 percent, no amount of income is subject to the tax limitation of section 1302.

Whether the petitioner received, in 1963, 80 percent of the total gross income in respect of his invention received during 1959 through 1964 is a question of fact. The burden is upon the petitioner to prove it.

We hold petitioner has failed to meet his burden of proof on this issue and that none of his 1963

income is entitled to the tax limitation under section 1302.

While petitioner has demonstrated that his patent was of significant value and that some portion of his 1963 income was income in respect of his invention, we have no evidence before us from which we can conclude that 80 percent of all such income for the years 1959 through 1964 was includable in petitioner's 1963 gross income. The petitioner has proffered no rational method of computing gross profit from his invention that would indicate he has met the 80 percent requirement.

We think at least that much is required by the statute. The petitioner's brief maintains that while section 1302 should be administered with "intelligence and sympathetic understanding," "the purpose and the spirit of the Section" is "entirely negated by [the Commissioner's] categorical hostility," presumably in requiring petitioner to demonstrate this requirement has been met. We are not permitted to ignore that requirement.

Decision will be entered for the Commissioner.

Appendix B-3

Tax Court of the United States
Washington

Docket No. 3979-67

Jorgen D. Bering and
Winifred E. Bering,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent.

ORDER AND MEMORANDUM

On December 2, 1968, petitioners filed a motion for retrial, further trial and reconsideration of our Memorandum Findings of Fact and Opinion that petitioner is not entitled to the limitation on tax provided by section 1302, I.R.C. 1954, in computing his income tax liability for the taxable year 1963. We held petitioner had failed to prove that the 1963 gross income in respect of his invention exceeded 80 percent of such gross income received in the years 1959 through 1964 inclusive.

Petitioner claims error in our conclusion. He attempts to demonstrate that he has met the 80 percent

requirement from the following figures, which we found as facts:[1]

	1962	1963	1964
Gross Receipts	$64,277.79	$169,887.61	$38,739.00
Less Costs of Goods Sold	34,612.83	72,918.55	8,828.53
Gross Profit	29,664.96	96,969.06	29,910.47
Less Expenses	17,630.59	28,250.20	23,622.67
Net Profit	$12,034.37	$ 68,718.86	$ 6,287.80

His argument is as simple as it is artful. Petitioner would compute "gross profit in respect of his invention" as a computable portion of the "Net Profit" figure for each year, computed as follows. He would have us compute manufacturing and sales profit as a fixed percentage of each year's "Cost" (i.e., the aggregate of "Costs of Goods Sold" and "Expenses"). The difference between "Net Profit" and manufacturing and sales profit is "*gross profit* in respect of his invention" (because there are no expenses attributable to his patent income). "Gross income in respect of his invention" for 1963 invariably exceeds 80 percent of such profit for the years 1959 through 1964:

	1963	Total[2] 1962-63-64	1963 Percentage of Total
Net Profit	$ 68,718.86	$ 87,041.03	
"Costs"	101,168.75	185,863.37	
Net Profit Less:			
2% of Cost	66,695.00	83,324.00	80%
5% of Cost	63,660.00	77,750.00	82.1%
10% of Cost	58,600.00	68,480.00	85.6%
15% of Cost	53,540.00	59,170.00	91.0%
20% of Cost	48,480.00	48,880.00	97.0%

[1]No figures are presented for 1959 through 1961, which showed losses and are therefore of no effect on petitioner's computations.

[2]No figures are included from 1959 through 1961 which showed losses and are therefore of no effect on petitioner's computation.

We have considered petitioner's method of computing gross profit in respect of his invention. We hold this method is not a permissible one in this case. As we understand it, we think this method is based upon a premise that is unwarranted on the facts—that the *same* percentage of "Cost" may be used to compute manufacturing and sales profit for 1962 and 1964 as for 1963. Petitioner sold *five* times as many valves in 1963 as he did in 1964. While his costs for 1963 were approximately double his 1962 costs, his net profit for 1963 was close to *six* times his net profit for 1962.

We adhere to our original conclusion. ORDERED: Petitioners' motion is denied.

Norman O. Tietjens,
Judge

Dated: Washington, D.C.
December 10, 1968

Appendix B-4

Tax Court of the United States
Washington

Docket No. 3979-67

Jorgen D. Bering and
Winifred E. Bering,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

ORDER

Memorandum Findings of Fact in this case was filed and served on October 30, 1968, and on the same date the decision was entered and served. Thereafter on December 30, 1968, the Court received the following documents from petitioner Jorgen D. Bering, (1) a "motion to vacate or revise decision of October 30, 1968, and motion for leave to file out of time" with attached affidavits and (2) "petitioner's second motion for retrial, further trial and reconsideration." Copies of the aforesaid documents, each of which have been lodged this date with the Court, are herewith served on counsel for respondent. After due consideration, it is

Ordered that the aforesaid document designated (1), above, be filed this date solely as a motion for leave to file out of time, and that the motion as so filed be and the same is hereby denied. It is further

Ordered that the aforesaid document designated (2), above, having been received by the Court more than 30 days after service of the opinion, remain lodged with the Court without further action thereon.

Norman O. Tietjens,
Judge

Dated: Washington, D.C.
December 31, 1968

Served Dec. 31, 1968

Appendix B-5

United States Court of Appeals
for the Ninth Circuit

Jorgen D. Bering and
Winifred E. Bering,
Petitioners-Appellants,
vs.
Commissioner of Internal Revenue,
Respondent-Appellee.
No. 23,973

[December 21, 1970]

On Appeal from the Decision and Orders
of the Tax Court of the United States

Before: Merrill, Carter and Hufstedler,
Circuit Judges

Merrill, Circuit Judge:

Appellants seek review of a decision of the Tax Court upholding the Commissioner in assessing an income tax deficiency of $13,934.31 for the year 1963.

Appellant taxpayer[1] is an inventor of a stainless steel valve, patent for which was obtained in 1959. The question presented is whether he is entitled to the income-spreading benefits of the original version of §1302 of the Internal Revenue Code, 26 U.S.C.

[1]We refer to appellant Jorgen D. Bering. Winifred E. Bering is joined since appellants are husband and wife and filed a joint tax return.

§1302 (1958),[2] as to the income derived "in respect of" the invention. The Tax Court held that he had failed to establish that "not less than 80 per cent of the gross income in respect of such invention" was received in 1963.

After securing his patent in 1959, taxpayer attempted unsuccessfully to interest others in obtaining licenses. Failing to do so, he had parts made by a machine shop and assembled them himself. His sales during 1959, 1960 and 1961 did not result in profit. Thereafter he was able to interest two large companies in his product and, since they did not wish to do their own manufacturing under license, commenced

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[2]"Sec. 1302. Income from an Invention or Artistic Work.
(a) Limitation on Tax.—If—
(1) an individual includes in gross income amounts in respect of a particular invention or artistic work created by the individual; and
(2) the work on the invention or the artistic work covered a period of 24 months or more (from the beginning to the completion thereof); and
(3) the amounts in respect of the invention or the artistic work includable in gross income for the taxable year are not less than 80 percent of the gross income in respect to such invention or artistic work in the taxable year plus the gross income therefrom in previous taxable years under the 12 months immediately succeeding the close of the taxable year, then the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over, in the case of an invention, that part of the period preceding the close of the taxable year or 60 months, whichever is shorter, or, in the case of an artistic work, that part of the period preceding the close of the taxable year but not more than 36 months.
(b) Definitions.—For the purpose of this section—
(1) Inventions.—The term 'invention' means a patent covering an invention of the individual."

manufacturing the product himself. His income from the sale of the patented valve was, for 1963, substantially greater than in previous years.

Had the taxpayer been able to sell the patent to customers who would themselves provide for the manufacture of the patented article, the taxpayer's income in respect of the invention would be represented by the customary royalties of sales price received for the use of the patent. But, where an inventor acts as his own manufacturer, the income in respect of the invention is a part of the profits from sale of the patented article. The problem is how to apportion the profits between income from the invention itself and income from the entrepreneurial enterprise of manufacture and sale. *See Alfred W. Barber,* 19 T.C. 600 (1952). The question is not dealt with by regulation. The Tax Court did not come up with an answer. It simply rejected the formula proposed by the taxpayer, which appears to be the only one by which 80 per cent of gross income from the invention could be made to fall in the year 1963.[3]

Appellant did not attempt to hypothesize a reasonable royalty, or any arms-length arrangement for compensation of the inventor by one who produces or otherwise exploits the product of the invention. Instead he reasoned as follows: postulating an ar-

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[3]Under the common royalty arrangements according to which the manufacturer pays the inventor a fixed sum per article sold or a percentage of receipts, the taxpayer would not here qualify. Only 42.47 percent of the total number of valves sold were sold in 1963; only 56.77 percent of the gross receipts from the sale of valves accrued in 1963.

rangement by which a machine shop is employed by the inventor to do the manufacturing and is compensated on a cost-plus basis, he concluded that all net profits above that "plus" should be attributable to the invention.

We agree with the Tax Court that this is not an acceptable method of determining the extent of income fairly attributable to the invention itself. At the least it must be said that the resulting figure represents return not only for the creative process resulting in the invention itself, but also for such exploitation activities as sale and distribution of the manufactured product.

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1492

JORGEN D. BERING AND WINIFRED E. BERING,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (Pet. App. iv-xii) and its further orders and memorandum (Pet. App. xiii-xvii) are not reported. The opinion of the court of appeals (Pet. App. xviii-xxi) is reported at 437 F. 2d 46.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1970. A petition for rehearing was denied on January 13, 1971 (Pet. App. xxii). The petition for a writ of certiorari was filed on March 19, 1971. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether petitioner [1] failed to receive at least 80 percent of the gross income from his patented valve seat invention during 1963, so that he did not qualify for the income-averaging benefits available under the original version of Section 1302 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Section 1302 of the Internal Revenue Code of 1954, as in force during 1963, is set forth in the Appendix to the petition (pp. i-ii).

STATEMENT

Petitioner is an industrial engineer and an inventor who in 1959 obtained a patent on a valve seat design. During that year and 1960, he was unable to interest others in manufacturing his valves on a royalty basis. Consequently, in order to exploit his invention, petitioner engaged various machine shops to manufacture valve parts, assembled the parts himself and sold the assembled valves. His small-scale operations during 1959, 1960 and 1961 resulted in a loss each year. (Pet. App. v-vi.)

Late in 1961, the two largest makers of milk filling

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[1] References to petitioner are to Jorgen D. Bering. Winifred E. Bering is a party hereto only because she filed a joint income tax return with her husband.

equipment in the United States adopted petitioner's float valves in their milk filling equipment. Although these companies were able to manufacture petitioner's valves, they expressed no interest in doing so on a royalty basis. Because of the suddenly increased demand for his valves, petitioner began to manufacture the valves himself. Not until 1963, however, did petitioner first earn a substantial profit. (Pet. App. vi.)

In reporting his income for 1963, petitioner claimed the income-spreading benefits of Section 1302 of the Internal Revenue Code of 1954. As it applied to taxable years ending prior to 1964, Section 1302 allowed individuals to treat the gross income received from a patented invention as though it had been received ratably over the entire income-producing period if certain conditions were met. Among these was the requirement that the gross income received "in respect of the invention" for the taxable year constitute at least 80 percent of the total gross income received from the beginning of the income-producing period through the twelve months immediately succeeding the close of the taxable year.

Petitioner attempted to demonstrate his qualification for Section 1302 treatment by computing his income "in respect of the invention" by deducting from total gross income for 1959 through 1964 the cost plus 10 percent of cost of manufacturing and sales activities during those years. These computations resulted in an amount of "invention income" for 1963 in excess of the required 80 percent for the entire period. However, the number of valves sold during 1963 was only 42.47

percent of the total number of valves sold from 1959 through 1964, and the gross receipts and net income for 1963 were only 56.77 percent and 78.94 percent, respectively, of the gross receipts and net income for the entire period. (Pet. App. vii-viii.)

The Tax Court ruled that petitioner had failed to establish his qualification under the 80 percent test (Pet. App. xi-xii). The court of appeals affirmed. It held that petitioner's method of allocating the total income between "invention income" and "business income" was unacceptable because it erroneously combined with income "in respect of the invention" all other income arising from petitioner's-entrepreneurial skills in exploiting the invention in excess of 110 percent of the costs of manufacture and sale. (Pet. App. xx-xxi.)

ARGUMENT

The decision below is correct. There is conflict or other reason for further review.

1. Petitioner does not assert conflict with any other decision, and we know of no conflict. Moreover, the income averaging provisions of the Code were substantially amended in 1964, so that the instant decision raises no question of continuing importance. See Sections 1301-1305 of the Code, as amended by Section 232 of the Revenue Act of 1964, P.L. 88-272, 78 Stat. 105.

2. There is no merit to petitioner's contention (Pet. 9-12) that he has been treated unfairly by facing at each stage of review of his claim a different rationale for rejection. The Commissioner, the Tax Court and

the court of appeals each determined that petitioner failed to qualify under Section 1302 because his proposed formula did not result in an income figure that reflected a return for the creative process alone.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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